

1           Matthew J. Brigham  
2           COOLEY LLP  
3           Five Palo Alto Square  
4           3000 El Camino Real  
5           Palo Alto, CA 94306-2155  
4           Phone: (650) 843-5000  
5           Fax: (650) 857-0663  
5           mbrigham@cooley.com

6 Christopher C. Campbell (*pro hac vice*)  
7 Nathan K. Cummings (*pro hac vice*)  
COOLEY LLP  
8 One Freedom Square – Reston Town Center  
11951 Freedom Drive  
9 Reston, Virginia 20190-5656  
Tel: 703 456-8000  
Fax: 703 456-8100  
10 ccampbell@cooley.com  
ncummings@cooley.com

11 Attorneys for Defendant  
12 **MILLENNIAL MEDIA, INC.**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

16 | EVOLUTIONARY INTELLIGENCE, LLC,

Case No.: 5:13-cv-4206-EJD

17 Plaintiff,

18

19 MILLENNIAL MEDIA, INC.

## **MILLENNIAL MEDIA'S MOTION TO STAY PENDING *INTER PARTES* REVIEW**

DATE: MARCH 7, 2014

TIME: 9:00 A.M.

JUDGE: HON. EDWARD J. DAVILA  
CTRM: 4, 5<sup>TH</sup> FLOOR

21 || Defendant

1

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## **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on March 7, 2014, at 9:00 a.m., Defendant Millennial  
3 Media, Inc. (“Millennial”) will, and hereby does, move to stay this action pending *inter partes*  
4 review of U.S. Patent Nos. 7,010,536 (the “536 Patent”) and 7,702,682 (the “682 Patent”) (the  
5 “Asserted Patents”) at the United States Patent & Trademark Office. This motion is based on this  
6 Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the  
7 declaration of Stephen P. McBride in support of this motion with accompanying exhibits, and the  
8 proposed order submitted herewith, all papers and pleadings on file in this action, such other  
9 evidence and argument as may be presented at or before any hearing on the motion and all  
10 matters of which the Court may take judicial notice.

11 The Court previously granted the Parties' stipulation to continue the Initial Case  
12 Management Conference until March 7, 2014 at 10:00 a.m., the same morning as the hearing on  
13 Millennial's motion to stay. (ECF No. 112). Should the Court determine oral argument is not  
14 necessary on this motion, Millennial respectfully requests that the Court continue the Initial Case  
15 Management Conference until after the motion has been decided.

## STATEMENT OF REQUESTED RELIEF

17 Millennial respectfully requests that the Court stay this action pending final resolution of  
18 the *inter partes* reviews of the Asserted Patents.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

21 This case should be stayed because eight petitions for *inter partes* review (“IPR”) are  
22 currently pending before the Patent and Trademark Office (“PTO”) challenging the validity of  
23 every claim of the Asserted Patents. These petitions cite prior art not previously identified in the  
24 initial patent prosecutions and demonstrate that each claim in the Asserted Patents is invalid.

25 This District has long promoted a liberal policy in favor of staying patent litigation while  
26 parallel invalidity proceedings are ongoing in the PTO. The policy, which was developed in the  
27 context of patent reexamination proceedings, applies with even greater force here in the context  
28 of IPR. Compared with patent reexamination and even litigation, IPR is a quick procedure. The

1 PTO must grant or deny a petition for IPR within six months, and must generally complete the  
 2 IPR within one year thereafter. A stay in this case is appropriate under all of the factors courts  
 3 consider when staying litigation pending PTO proceedings.

4 Indeed, six other cases filed by Plaintiff Evolutionary Intelligence (“Evolutionary”) co-  
 5 pending in this District have already been stayed under the exact same facts present here.<sup>1</sup> In  
 6 order to avoid the unnecessary burden and expense to the parties and the Court of litigating  
 7 another similar motion, Millennial asked whether Evolutionary would stipulate to stay this case at  
 8 least until the PTO has decided the pending requests for *inter partes* review. Evolutionary  
 9 refused Millennial’s request, thus necessitating this motion.

10 **II. STATEMENT OF ISSUES TO BE DECIDED**

11 Should this action be stayed, in order to conserve judicial and party resources, pending the  
 12 final resolution of the *inter partes* reviews of the Asserted Patents?

13 **III. BACKGROUND**

14 **A. Evolutionary’s Lawsuit Against Millennial**

15 On October 17, 2012, Evolutionary, a non-practicing entity based in San Francisco, filed  
 16 suit against Millennial in the Eastern District of Texas, alleging infringement of the Asserted  
 17 Patents. (EDTX ECF No. 1.)<sup>2</sup> Millennial filed its Answer on December 17, 2012 and a few days  
 18 later moved to transfer venue to this District under 28 U.S.C. § 1404(a). (EDTX ECF Nos. 9, 13.)  
 19 In response to Millennial’s motion to transfer, Evolutionary sought multiple extensions to the  
 20 briefing schedule so that it could first take venue discovery. (See EDDTX ECF Nos. 15, 19, 22,  
 21 24.) Evolutionary’s repeated requests delayed the decision on Millennial’s motion to transfer  
 22 until August 27, 2013, when the Texas court granted Millennial’s motion and ordered the case

23  
 24 <sup>1</sup> The cases that have been stayed are *Evolutionary Intelligence v. Yelp Inc.*, Case No. 4-13-cv-03587-DMR, Dkt. No. 108; *Evolutionary Intelligence v. Apple, Inc.*, Case No. 3-13-cv-04201-WHA, Dkt. No. 123; *Evolutionary Intelligence v. Foursquare Labs, Inc.*, Case No. 3-13-cv-04203-MMC, Dkt. No 99; *Evolutionary Intelligence v. LivingSocial, Inc.*, Case No. 3-13-cv-04205-WHO, Dkt. No. 96; *Evolutionary Intelligence v. Facebook, Inc.*, Case No. 3-13-cv-04202-SI, Dkt. No. 148; and *Evolutionary Intelligence v. Groupon, Inc.*, Case No. 3-13-cv-04204-SI, Dkt. No. 104. A similar motion to stay has been fully briefed at *Evolutionary Intelligence v. Twitter, Inc.*, Case No. 3-13-cv-04207-JSW, Dkt. Nos. 95, 100, 105.

25  
 26 <sup>2</sup> ECF citations preceded by “EDTX” are to docket entries in this case filed before Judge Leonard Davis (later  
 27 reassigned to Judge Michael H. Schneider) in the Eastern District of Texas (Case No. 6:12-cv-00790-MHS-CMC)  
 28 prior to transfer. All other ECF citations are to the docket entries for this case in the Northern District of California.

1 transferred to this Court. (EDTX ECF No. 88.) Following transfer, this Court scheduled an  
 2 Initial Case Management Conference for January 17, 2014. (ECF No. 106.) The Court later  
 3 granted the Parties' stipulation to reschedule the conference to March 7, 2014, the same morning  
 4 as the hearing on this motion. (ECF No. 112.)

5 To date, the only discovery that has taken place in this litigation consists of venue  
 6 discovery related to Millennial's transfer motion and one set of interrogatories served by  
 7 Evolutionary and answered by Millennial. In addition, Evolutionary has served Infringement  
 8 Contentions, which admit that Evolutionary does not practice the Asserted Patents. (McBride  
 9 Decl. Ex. 1 at 7.)<sup>3</sup>

10 **B. Overview of IPR Proceedings**

11 One purpose of the America Invents Act ("AIA") was "to establish a more efficient and  
 12 streamlined patent system that will improve patent quality and limit unnecessary and  
 13 counterproductive litigation costs." H.R. Rep. No. 112-98 (part 1), at 40 (2011). One of the ways  
 14 Congress sought to streamline the patent system was with a new proceeding called *inter partes*  
 15 review or "IPR," which allows expeditious review by the PTO of patents of questionable validity.  
 16 IPR allows a full adversarial challenge—including an oral hearing and discovery—regarding the  
 17 validity of the patents under 35 U.S.C. §§ 102 and/or 103 based on prior art patents and printed  
 18 publications. 35 U.S.C. §§ 311(b), 316(a); 37 C.F.R. §§ 42.51, 42.53. The statute established the  
 19 Patent Trial and Appeal Board ("PTAB"), and each IPR is conducted before a panel of three  
 20 technically trained patent judges of the PTAB. 35 U.S.C. §§ 6, 311.

21 The first step in the IPR is when the challenger files a written petition seeking such  
 22 review. The patent owner may then file a preliminary response, but must do so within three  
 23 months. 35 U.S.C. § 313. The PTAB then determines whether to initiate IPR based on whether  
 24 the petitioner has shown "a reasonable likelihood that the petitioner will prevail with respect to at  
 25 least 1 of the claims challenged in the petition." 35 U.S.C. § 314(a). The PTAB must make this  
 26 decision within six months of the petition. 35 U.S.C. § 314. If IPR is initiated, the PTAB must  
 27 issue a final determination within one year, which may be extended up to six months for good  
 28

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<sup>3</sup> Unless otherwise indicated, all Exhibits are attached to the McBride Declaration.

1 cause shown. 35 U.S.C. § 316(a)(11). Given its strict timing requirements, IPR is designed to (a)  
 2 reduce to 12 months the time the PTO spends reviewing validity, from the previous  
 3 reexamination average of 36.2 months (77 Fed. Reg. 48,680, 48,725, 48,721 (Aug. 14, 2012)  
 4 (codified at 37 C.F.R. §§ 42.100 et seq.)); and (b) “minimize duplication of efforts ... [through]  
 5 more coordination between district court infringement litigation and inter partes review ...” (*id.* at  
 6 48,721).

7 **C. The Asserted Patents and Pending IPRs**

8 The Asserted Patents are directed to managing and manipulating data based on historical  
 9 interactions, time, or three-dimensional space. *See, e.g.*, Ex. 2, '536 patent, Abstract, Claims 1 &  
 10 2; Ex. 3, '682 patent, Abstract, 6:10-19, Claim 1. On October 22 and 23, 2013, defendants from  
 11 several other Evolutionary litigations filed eight petitions for IPR, collectively challenging the  
 12 validity of each and every claim in the Asserted Patents.<sup>4</sup> (Ex. 4.) All eight of these petitions  
 13 were filed within the statutorily mandated time period. Evolutionary filed preliminary responses  
 14 to each of these petitions on January 28, 29, and 30, 2014. The chart below summarizes the  
 15 pending IPR petitions:

Patent	Challenged Claims	Date of Filing	Challenger	Case No.
'536 Patent	15 and 16	October 23, 2013	Facebook	IPR2014-00093
'536 Patent	1-16 (all claims)	October 23, 2013	Yelp and Twitter	IPR2014-00092
'536 Patent	1, 3-15	October 22, 2013	Apple	IPR2014-00083
'536 Patent	1, 3-15	October 22, 2013	Apple	IPR2014-00082
'536 Patent	2-14 and 16	October 23, 2013	Apple	IPR2014-00085
'536 Patent	2-14 and 16	October 22, 2013	Apple	IPR2014-00086
'682 Patent	1-23 (all claims)	October 22, 2013	Apple	IPR2014-00079
'682 Patent	1-23 (all claims)	October 23, 2013	Apple	IPR2014-00080

26 (Ex. 4.)

27  
 28 <sup>4</sup> Millennial did not file any of these IPRs. Evolutionary has asserted Claims 1-16 of the '536 patent and Claims 1, 3-7, 10, 11, 14-22 of the '682 patent against Millennial.

#### D. Stays of Co-pending Evolutionary Litigation

This action is one of nine cases co-pending in this District where Evolutionary is alleging infringement of the '536 and '682 patents. The following chart summarizes the status of these cases:

Case	Motion to Stay filed?	Status
<i>Evolutionary Intelligence v. Yelp</i> , Case No. 4-13-cv-03587-DMR	Yes	Stayed pending resolution of the IPRs.  Opinion attached as Ex. 5 and available at 2013 U.S. Dist. LEXIS 178547.
<i>Evolutionary Intelligence v. Apple</i> , Case No. 3-13-cv-04201-WHA	Yes	Stayed pending PTO's decision whether to institute the IPRs.  Opinion attached as Ex. 6 and available at 2014 U.S. Dist. LEXIS 2763.
<i>Evolutionary Intelligence v. Foursquare Labs</i> , Case No. 3-13-cv-04203-MMC	Yes	Stayed pending resolution of the IPRs.  Opinion attached as Ex. 7.
<i>Evolutionary Intelligence v. LivingSocial</i> , Case No. 3-13-cv-04205-WHO	Yes	Stayed pending resolution of the IPRs.  Opinion attached as Ex. 8 and available at 2014 U.S. Dist. LEXIS 6804.
<i>Evolutionary Intelligence v. Facebook</i> , Case No. 3-13-cv-04202-SI	Yes	Stayed pending resolution of IPRs.  Opinion attached as Ex. 9 and available at 2014 U.S. Dist. LEXIS 9149.
<i>Evolutionary Intelligence v. Groupon</i> , Case No. 3-13-cv-04204-SI	Yes	Stayed pending resolution of IPRs.  Opinion attached as Ex. 9 and available at 2014 U.S. Dist. LEXIS 9149.
<i>Evolutionary Intelligence v. Millennial Media</i> , Case No. 5-13-cv-04206-EJD	Yes	Motion to stay pending; hearing date set for 3/7/2014.
<i>Evolutionary Intelligence v. Twitter</i> , Case No. 3-13-cv-04207-JSW	Yes	Motion to stay pending; hearing date set for 3/7/2014.
<i>Evolutionary Intelligence v. Sprint Nextel et al.</i> , Case No. 5-13-cv-04513-RMW	No	No activity since transfer from Texas.

In *every* Evolutionary case where the Court has decided the defendant's motion to stay, it has granted the stay. In five of the cases (*Yelp*, *Foursquare*, *LivingSocial*, *Facebook* and

1 *Groupon*), the Court has granted a stay pending final resolution of the requested IPRs. Exs. 5, 7,  
 2 8, 9. In the *Apple* litigation, the Court granted a stay until the PTO decides whether to initiate the  
 3 IPRs, at which point the Court will evaluate whether to continue the stay. Ex. 6 at 6-7.

4 **IV. LEGAL STANDARD**

5 Courts in this District have long recognized “a liberal policy in favor of granting motions  
 6 to stay proceedings pending the outcome of USPTO reexamination or reissuance proceedings.”  
 7 *Convergence Techs. (USA), LLC v. Microloops Corp.*, No. 5:10-cv-02051 EJD, 2012  
 8 WL1232187, at \*2 (N.D. Cal. Apr. 12, 2012) (Davila, J.) (quoting *ASCII Corp. v. STD Entm’t*  
 9 *USA, Inc.*, 844 F. Supp. 1378, 1381 (N.D. Cal. 1994)).<sup>5</sup> Courts consider three factors in  
 10 determining whether to grant a stay pending PTO review of an issued patent: “(1) whether  
 11 discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the  
 12 issues in question and trial of the case; and (3) whether a stay would unduly prejudice or present a  
 13 clear tactical disadvantage to the nonmoving party.” *Pragmatus AV, LLC v. Facebook, Inc.*, No.  
 14 11-CV-00494-EJD, 2011 WL 4635512, at \*2 (N.D. Cal. Oct. 5, 2011) (Davila, J.) (internal  
 15 quotations and citation omitted); *see also Pragmatus AV, LLC v. Facebook, Inc.*, No. 11-CV-  
 16 02168-EJD, 2011 WL 4802958, at \*2 (N.D. Cal. Oct. 11, 2011) (Davila, J.).

17 “Courts need not expend unnecessary judicial resources by attempting to resolve claims  
 18 which may be amended, eliminated or lucidly narrowed by the patent reexamination process and  
 19 the expertise of [PTO] officers.” *Rembrandt Gaming Techs., LP v. Boyd Gaming Corp.*, No.  
 20 2:12-cv-00775-MMD-GWF, 2012 WL 6021339, at \*1 (D. Nev. Dec. 3, 2012) (internal quotations  
 21 and citation omitted). Thus, a stay is “particularly justified where the outcome of the  
 22 reexamination would be likely to assist the court in determining patent validity and, if the claims  
 23 were canceled in the reexamination, would eliminate the need to try the infringement issue.”  
 24 *Convergence Techs.*, 2012 WL 1232187, at \*1 (quoting *In re Cygnus Telecomms. Tech., LLC,*  
 25 *Patent Litig.*, 385 F. Supp. 2d 1022, 1023 (N.D. Cal. 2005)); *see also, e.g., Droplets, Inc. v.*  
 26 *Yahoo! Inc.*, Nos. 12-cv-03733-JST, -04049, 2013 WL 5116002, at \*1 (N.D. Cal. Sept. 13, 2013)

27 <sup>5</sup>*See also Yodlee, Inc. v. Ablaise Ltd.*, Nos. C-06-07222 SBA, -2451, -1995, 2009 WL 112857, at \*2 (N.D. Cal. Jan.  
 28 16, 2009); *Tse v. Apple Inc.*, No. C 06-06573 SBA, 2007 WL 2904279, at \*1 (N.D. Cal. Oct. 4, 2007); *Photoflex*  
*Prods., Inc. v. Circa 3 LLC*, No. C 04-03715 JSW, 2006 WL 1440363, at \*1 (N.D. Cal. May 24, 2006).

1 (granting stay pending *inter partes* reexamination and noting that “final determination of the  
 2 USPTO is quite likely to simplify issues”).

3       Although IPR is a relatively new procedure, district courts within the Ninth Circuit have  
 4 repeatedly affirmed that the “liberal [stay] policy” applies with full force to IPR proceedings.  
 5 *See, e.g., Star Envirotech, Inc. v. Redline Detection, LLC*, No. SACV 12-01861-JGB(MLGx),  
 6 2013 WL 1716068, at \*2 (C.D. Cal. Apr. 3, 2013) (after noting the liberal policy in favor of  
 7 granting stays adopted by the N.D. Cal. in *ASCII*, the court granted a stay pending petition for  
 8 IPR and emphasized that “the amended standards for granting inter partes review probably results  
 9 in an even higher likelihood than under the prior standard that the issues in the action will be  
 10 simplified by the reexamination”) (internal quotations and citation omitted); *accord Software*  
 11 *Rights Archive, LLC v. Facebook, Inc. et al.*, Nos. C-12-3970 RMW, -3971, -3972, 2013 WL  
 12 5225522, at \*6 (N.D. Cal. Sept. 17, 2013); *Semiconductor Energy Lab. Co. v. Chimei Innolux*  
 13 Corp., No. SACV 12-21-JST (JPRx), 2012 WL 7170593, at \*4 (C.D. Cal. Dec. 19, 2012).

14 **V. ARGUMENT**

15 **A. The Stage of This Case Favors a Stay**

16       The first element of the stay analysis focuses “on the stage of litigation proceedings, not  
 17 the length of time that has passed since the filing of the case.” *Wireless Recognition Tech. v.*  
 18 *A9.com Inc.*, Nos. 12-cv-01217-EJD, -1218, -1220, 2012 WL 4005459, at \*2 (N.D. Cal. Sept. 11,  
 19 2012) (Davila, J.). “A stay is particularly appropriate for cases in the initial stages of litigation or  
 20 in which there has been little discovery.” *Internet Patents Corp. v. eBags, Inc.*, Case No. C 12-  
 21 03385 SBA, 2013 U.S. Dist. LEXIS 122868, at \*6-7 (N.D. Cal. Aug. 28, 2013) (quoting *Tse v.*  
 22 *Apple Inc.*, Case No. C 06-06573 SBA, 2007 WL 2904279, at \*2-3 (N.D. Cal. Oct. 4, 2007)).

23       As discussed above, this case is in its very early stages. Only limited discovery has taken  
 24 place, most of which was related to Millennial’s transfer motion. Neither side has yet taken any  
 25 depositions. There is no schedule in place, and the initial case management conference is not  
 26 until March 7, 2014. Courts in this District “strongly favor” granting stays pending the outcome  
 27 of PTO proceedings when—as here—there has been no material progress in the litigation.  
 28 *Pragmatus*, 2011 WL 4802958, at \*3. This Court has repeatedly granted stays pending

1 completion of proceedings at the PTO under similar circumstances—including in each of the co-  
 2 pending Evolutionary litigations where the Court has decided the issue. *See, e.g., Evolutionary*  
 3 *Intelligence, LLC v. Facebook, Inc.*, Nos. 3-13-cv-04202-SI, -4204, 2014 U.S. Dist. LEXIS 9149,  
 4 at \*5-6 (N.D. Cal Jan. 23, 2014) (quoting *Pragmatus* and holding that the early stage of litigation  
 5 weighs in favor of a stay).<sup>6</sup>

6 Indeed, stays are often granted in circumstances where the litigation is much more  
 7 advanced than here. For example, although the *Convergence Technologies* case had been  
 8 pending for more than two years, the parties had engaged in discovery, and had already filed  
 9 claim construction briefs, this Court concluded that the case had “not reached the ‘point of no  
 10 return’ for which a stay would [be] inappropriate.” 2012 WL 1232187, at \*4; *see also AT&T*  
 11 *Intellectual Prop. I v. Tivo, Inc.*, 774 F. Supp. 2d 1049, 1052 (N.D. Cal. 2011) (concluding that  
 12 the stage-of-the-proceedings factor weighed in favor of a stay even where the parties had filed  
 13 claim construction briefs but had not exchanged expert reports or taken any depositions).  
 14 Similarly, a stay was granted in *Yodlee* where a *Markman* hearing had already been held and the  
 15 claim construction had already issued in a concurrent case on the identical patent claims. 2009  
 16 WL 112857, at \*1-2, \*6-7. Accordingly, the early stage of this litigation weighs heavily in favor  
 17 of a stay.

18 **B. *Inter Partes* Review Will Simplify the Issues for Trial**

19 Resolution of the eight pending IPR petitions will streamline this litigation and, in fact,  
 20 may entirely eliminate it. “[W]aiting for the outcome of the reexamination could eliminate the  
 21 need for trial if the claims are cancelled or, if the claims survive, facilitate trial by providing the  
 22 court with expert opinion of the PTO and clarifying the scope of the claims.” *Target*  
 23 *Therapeutics, Inc. v. SciMed Life Sys., Inc.*, 1995 WL 20470, at \*2 (N.D. Cal. Jan. 13, 1995);  
 24 *accord Gould v. Control Laser Corp.*, 705 F.2d 1340, 1342 (Fed. Cir. 1983); *see also Fresenius*

25 <sup>6</sup> *See also Internet Patents Corp.*, 2013 U.S. Dist. LEXIS 122868, at \*6-7; *Tse*, 2007 WL 2904279, at \*2-3 (“A stay  
 26 is particularly appropriate for cases in the initial stages of litigation or in which there has been little discovery.”);  
 27 *KLA-Tencor Corp. v. Nanometrics, Inc.*, No. C 05-03116 JSW, 2006 WL 708661, at \*2 (N.D. Cal. Mar. 16, 2006)  
 28 (granting stay where discovery had just begun); *Target Therapeutics, Inc. v. SciMed Life Sys., Inc.*, No. C-94-20775  
 RPA (EAI), 1995 WL 20470, at \*2 (N.D. Cal. Jan. 13, 1995) (holding that the absence of significant discovery or  
 substantial expense and time invested in the litigation weighed in favor of stay); *ASCI*, 844 F. Supp. at 1381  
 (granting stay where the parties had undertaken little or no discovery).

1     *USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1340 (Fed. Cir. 2013) (“[W]hen a claim is  
 2     cancelled, the patentee loses any cause of action based on that claim, and any pending litigation in  
 3     which the claims are asserted becomes moot.”).

4     Here, IPR has been sought for all the claims of the Asserted Patents. Therefore, if the  
 5     PTO initiates the IPRs, there is a chance that the review could eliminate the case by rendering all  
 6     of Evolutionary’s claims for infringement moot. *See Fresenius*, 721 F.3d at 1340. Even if one or  
 7     more claims survive, the IPRs will narrow the issues in any future litigation. *See Pragmatus*,  
 8     2011 WL 4802958, at \*3 (staying action prior to grant of *inter partes* reexamination in part  
 9     because defendant’s petition implicated all claims in the litigation). Moreover, the IPRs will  
 10    likely provide intrinsic evidence that will need to be considered to properly reach the merits of  
 11    this case. Thus, the IPRs will eliminate trial of claims that are canceled and, in the unlikely event  
 12    any claim survives, facilitate trial of that claim by giving the Court the benefit of the expert view  
 13    of the PTO. *See Semiconductor Energy*, 2012 WL 7170593, at \*2.

14    Recent PTO statistics further support a stay. Through August 2013, 87% of petitions for  
 15    *inter partes* review have been granted.<sup>7</sup> Additionally, in the prior reexamination context, 42% of  
 16    reexaminations resulted in claims that were cancelled or disclaimed in their entirety (Ex. 11),  
 17    which if it occurred here, would effectively eliminate the need for this litigation. Judge Whyte  
 18    likewise recently noted:

19           Although there is no guarantee that an IPR will eliminate all the  
 20    claims at issue, the higher standard to initiate an IPR (“reasonable  
 21    likelihood that the petitioner would prevail with respect to at least  
 22    1 of the claims challenged in the petition” as opposed to  
 23    “substantial new question of patentability”) gives at least some  
 24    promise that certain challenged claims will be struck down or  
 25    amended if the PTO grants the petitions. In addition, the limited  
 26    statistics available to the court do indicate a likelihood that the  
 27    PTO will grant the IPR petitions, at least with respect to some of  
 28    the asserted claims.

25    *Software Rights Archive*, 2013 WL 5225522, at \*5.

26    In fact, every judge in this District that has decided a motion to stay in one of the  
 27    Evolutionary litigations has agreed that the pending IPRs are likely to simplify the issues for trial.

28    <sup>7</sup> *See* <http://www.alston.com/advisories/inter-partes-review/>. (Ex. 10.)

1 *See, e.g., Evolutionary Intelligence, LLC v. Yelp Inc.*, No. C-13-03587 DMR, 2013 U.S. Dist.  
 2 LEXIS 178547, at \*23 (N.D. Cal. Dec. 18, 2013) (“Here, if the PTAB cancels all of the asserted  
 3 claims of the Asserted Patents, this action will be rendered moot. Should the PTAB cancel or  
 4 narrow any of the asserted claims of the Asserted Patents, the scope of this litigation may be  
 5 significantly simplified.”). Because the IPRs will simplify issues in this litigation, while  
 6 proceeding without a stay will likely waste significant time and resources, this factor strongly  
 7 weighs in favor of a stay.

8 **C. A Stay Will Not Unduly Prejudice Evolutionary**

9 Evolutionary will not be unduly prejudiced by a stay, due to the rapid statutory schedule  
 10 for IPRs and the nature of Evolutionary’s business and claims. The “delay inherent in the [old]  
 11 reexamination process does not constitute, by itself, undue prejudice” (*ESCO Corp. v. Berkeley*  
 12 *Forge & Tool, Inc.*, No. 09-1635 SBA, 2009 U.S. Dist. LEXIS 94017, at \*10 (N.D. Cal. Sept. 28,  
 13 2009)), and the “delay caused by the new [*inter partes* review] procedure is significantly less than  
 14 the delay caused by the old [reexamination] procedure.” *Semiconductor Energy*, 2012 WL  
 15 7170593, at \*3; *accord Evolutionary Intelligence, LLC v. Facebook, Inc.*, 2014 U.S. Dist. LEXIS  
 16 9149, at \*5.

17 Further, Evolutionary will not be any more prejudiced by delay than any other plaintiff  
 18 whose patent infringement claim is stayed pending an IPR petition. *See Star Envirotech*, 2013  
 19 WL 1716068, at \*2 (plaintiff provided no other justification other than it “needs to diligently  
 20 enforce its patent rights to have a legitimate chance of success in the marketplace”; the court held  
 21 that “IPR is a procedure that aids in that enforcement of patent rights while streamlining the  
 22 issues in need of litigation”) (citation omitted). Especially given the quick schedule for IPRs,  
 23 “the mere fact and length of any delay … does not demonstrate prejudice sufficient to deny [a]  
 24 request for a stay.” *Semiconductor Energy*, 2012 WL 7170593, at \*3 (quoting *Tierravision, Inc.*  
 25 v. *Google, Inc.*, No. 11cv2170 DMS(BGS), 2012 WL 559993, at \*3 (S.D. Cal. Feb. 21, 2012)).

26 Moreover, Evolutionary will not be prejudiced because it has no reasonable basis for  
 27 seeking anything other than monetary damages. Evolutionary has not alleged that it competes  
 28 directly with Millennial, nor has Evolutionary sought a preliminary injunction. Indeed,

1 Evolutionary has admitted that it does not practice the Asserted Patents. (Ex. 1 at 7.) Thus, no  
 2 prejudice will flow to Evolutionary from a stay. *See Neste Oil OYJ v. Dynamic Fuels, LLC, et al.*,  
 3 Case No. 1:12-cv-01744-GMS, 2013 WL 3353984, at \*4-5 (D. Del. July 2, 2013) (granting  
 4 motion to stay pending *inter partes* reexamination and finding no prejudice because patent owner  
 5 had not sought a preliminary injunction and was not a direct competitor); *Convergence Techs.*,  
 6 2012 WL 1232187, at \*2-3 (granting motion to stay, in part, because plaintiff did not practice the  
 7 asserted patent and was not in direct competition with defendant). Delaying monetary relief, if  
 8 any, is simply not prejudicial. *See, e.g., Evolutionary Intelligence, LLC v. Yelp, Inc.*, 2013 U.S.  
 9 Dist. LEXIS 178547, at \*25 (“[C]ourts have consistently found that a patent licensor cannot be  
 10 prejudiced by a stay because monetary damages provide adequate redress for infringement.”)  
 11 (quoting *Pragmatus*, 2011 U.S. Dist. LEXIS 117147, at \*3); *Broad. Innovation, LLC v. Charter*  
 12 *Commc’ns, Inc.*, Civ. A. No. 03-cv-2223-ABJ-BNB, 2006 U.S. Dist. LEXIS 46623, at \*33-34 (D.  
 13 Colo. July 11, 2006) (“this factor weighs in favor [of] staying the case because monetary relief ...  
 14 is fully capable of restoring Plaintiffs to the status quo ante”).

15 **VI. CONCLUSION**

16 Because all three factors considered in determining whether to stay litigation pending  
 17 *inter partes* review weigh in favor of a stay, Millennial respectfully requests that the Court stay  
 18 this action pending final resolution of the IPRs of the Asserted Patents.

19 Dated: January 31, 2014

COOLEY LLP

20 By: /s/Nathan K. Cummings

21 Matthew J. Brigham

22 COOLEY LLP

23 Five Palo Alto Square

3000 El Camino Real

24 Palo Alto, CA 94306-2155

25 Phone: (650) 843-5000

Fax: (650) 857-0663

[mbrigham@cooley.com](mailto:mbrigham@cooley.com)

26 Christopher C. Campbell (*pro hac vice*)

27 Nathan K. Cummings (*pro hac vice*)

28 COOLEY LLP

One Freedom Square – Reston Town Center

1 11951 Freedom Drive  
2 Reston, Virginia 20190-5656  
3 Tel: 703 456-8000  
4 Fax: 703 456-8100  
ccampbell@cooley.com  
ncummings@cooley.com

5 ATTORNEYS FOR DEFENDANT  
6 MILLENNIAL MEDIA, INC.  
7  
8  
9  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5-5(a)(1) on January 31, 2014.

*/s/ Nathan K. Cummings*